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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

HERMAN TELFAIR,

Petitioner,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
and
LUCKENBACH STEAMSHIP COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A

OPINIONS BELOW

The petitioner, Herman Telfair, seeks a writ of certiorari to review the judgment and decision of the United States Court of Appeals, Fifth Circuit, in the case of

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NOTE: All Emphasis Supplied

R: References to Record on Appeal before Fifth Circuit on appeal of Telfair

T: Transcript of trial proceedings in record below.

Herman Telfair, plaintiff-appellant vs. Zim Israel Navigation Company, Limited, a foreign corporation, Defendant, Third-Party Plaintiff, Appellee vs. Luckenbach Steamship Company, a corporation, Third-Party Defendant, Appellee, case no. 27,418, which, among other things, affirmed a final judgment in favor of Telfair, as plaintiff, against Zim Israel.

Telfair, the petitioner here, was seeking reversal of that judgment, and reinstatement of a prior judgment, which had been set aside on a new trial order entered by the trial court, in this unseaworthiness personal injury case.

Copies of the following decisions, opinions and proceedings are appended hereto:

Appendix A — Order of United States Court of Appeals for the Fifth Circuit, dated and entered July 22, 1970, denying Telfair's petition for rehearing.

Appendix B — Opinion and judgment of the Fifth Circuit, affirming the judgment, dated June 19, 1970.

Appendix C — Order of United States District Court in and for the Middle District of Florida, denying motion of plaintiff Telfair for new trial.

Appendix D — Final judgment in favor of Telfair in amount of $50,000.

Appendix E — Order of United States District Court in and for the Middle District of Florida, granting motion of Zim Israel for new trial after first verdict and judgment.

Appendix F — Motion of Zim Israel for new trial after first trial.

Appendix G, H — Judgment for plaintiff, Telfair, against Zim Israel, in amount of $123,285.00 after first trial.

Appendix I — Jury verdict for Telfair after first trial in amount of $123,285.00.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, was dated June 19, 1970. (Appendix B). The petition for rehearing was denied, July 22, 1970 (Appendix A). Jurisdiction is invoked pursuant to 28 U.S.C., §1254(1); and 28 U.S.C. 2101(c); and Supreme Court of the United States, Revised Rules, effective July 1, 1970, Rule 19(1)(a) and (b); Rule 21; Rule 22(3).

C

QUESTION PRESENTED FOR REVIEW

WHETHER A LONGSHOREMAN, PRIOR TO ENTERING THE HOLD OF A SHIP ON A RUNG LADDER, OWES A DUTY OF CARE

TO HIMSELF A) TO SEARCH FOR AND DISCOVER GREASE ON A RUNG, WHERE THERE IS NO EVIDENCE THAT THE GREASE IS VISIBLE FROM THE DECK; OR B) TO WATCH A CO-EMPLOYEE GO DOWN THE LADDER IN ANTICIPATION OF AN UNSEAWORTHY LADDER.

D

STATUTES AND CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED

NONE INVOLVED.

E

STATEMENT OF THE CASE

I. Proceedings In Trial Court

a) On December 1, 1966, the petitioner, Herman Telfair, a Florida citizen, filed an action at law in Circuit Court in and for Hillsborough County, Florida, against the defendant-appellee, Zim Israel Navigation Company, Limited, an Israeli Corporation. In his complaint, the plaintiff, a longshoreman, alleged that he slipped on grease on an access ladder while working aboard the defendant's ship, THE MAZAL, in May, 1966, at the Luckenbach Terminal in the Port of Tampa, and sustained severe and permanent personal injuries. The complaint was framed in two counts; i) negligence, and ii) unseaworthiness. Damages in excess of $50,000 were sought and trial by jury demanded.

b) On December 22, 1966, the defendant, (the respondent here) Zim Israel, removed the case to the United States District Court in and for the Middle District of Florida on diversity grounds. Zim Israel also answered and interposed, inter-alia, general denials and an affirmative defense of contributory (or comparative) negligence.

c) In May, 1967, Zim Israel filed and served its third-party complaint against the stevedore company, Luckenbach Steamship Company, a non-Florida corporation, contending that if the plaintiff was injured as alleged in the complaint, the stevedore would be ultimately responsible and at fault, and would be obliged to indemnify Zim Israel for plaintiff's damages, plus costs, expenses and attorneys fees incurred. The third-party defendant answered, on May 31, 1967, denying responsibility and alleging inter-alia, contributory negligence of the plaintiff.

d) After extensive discovery, the cause proceeded to a complete and thorough trial before Honorable Joseph P. Leib and a jury on March 25-27, 1968. The trial court, at the conclusion of all the evidence, granted the plaintiff's motion for a directed verdict on the defense of contributory negligence for absence of evidence.

e) The case was submitted to the jury on theories of Zim Israel negligence and unseaworthiness. A verdict was returned in favor of the plaintiff on the unseaworthiness count in the amount of $133,385.00, and in favor of Zim Israel on the negligence count. Judgment was entered in favor of the plaintiff on the verdict on March 27, 1968.

f) On April 4, 1968, Zim Israel filed post-trial motions for judgment in accordance with its trial motion for directed verdict, for remittitur and for new trial. Numerous memoranda were filed and by order dated May 27, 1968, the trial court denied the motions for judgment N.O.V. and for remittitur, but granted the motion for new trial. In its order the court said in relevant part:

> "The court finds that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff." (Appendix E).

g) A second trial was had, and a jury verdict in favor of the plaintiff in the amount of $50,000 was returned. Judgment was entered thereon on October 22, 1968. The plaintiff moved for a new trial by motion dated October 28, 1968. The motion was denied by order dated November 22, 1968.

II. Appellate Proceedings

a) In the meantime, the trial court had under advisement the third-party claim. The plaintiff, however, filed an appeal on December 20, 1968, from the judgment of October 22, 1968, urging in its statements of issues that the trial court had erred in granting Zim Israel's new trial motion, after the first trial, thus depriving plaintiff of his $133,385 verdict and judgment.[1]

---

[1]The appeal was protective in nature, since counsel for the plaintiff was uncertain as to finality of the October 22, 1968 judgment, for appellate purposes, since the third-party claim was still pending; see Rule 54 (b), Federal Rules of Civil Procedure, but in no event wanted the appeal time to expire if the judgment of October 22 were final.

b) Thereafter, on February 26, 1969, the trial court entered judgment in favor of Zim Israel and against Luckenbach on the third-party claim, with findings of fact and conclusions of law. However, the court reserved ruling on costs and attorney's fees. On March 7, 1969, Luckenbach filed post-trial motions, including motion for new trial on the third-party claim.

c) On April 9, 1969, the post-trial motions of Luckenbach were denied, and on application of Zim Israel, attorney's fees were assessed in the amount of $20,000 against Luckenbach.

d) At this juncture, the plaintiff filed a new appeal, on April 23, 1969, on the theory that the order of April 9, 1969, finally disposed all of the rights of all of the parties, and finally disposed of the indemnity claim including attorney's fees, and that in any event, the time for appeal by any party commenced to run only on April 9, 1969, under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. On the new appeal, the petitioner, Telfair raised the precise same point as he did on the prior appeal.

e) By order dated May 6, 1969, the 5th Circuit granted the motion of the plaintiff-appellant to consolidate his two appeals, and to use the records on appeal interchangeably, on the grounds that one of the two appeals was appropriate and one inappropriate.[2]

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[2]Yet another appeal was involved. By notice dated April 30, 1969, the third-party defendant has appealed, challenging the indemnity judgment against it, in favor of Zim Israel, entered upon the second trial. That issue is not involved here.

On either or both appeals, however, one issue was properly presented, that is; whether the trial court erred in granting the new trial on the ground that it did, after the first trial. The plaintiff urged that it did err. In short, the plaintiff challenged the new trial order, and sought reinstatement of his original verdict and judgment against Zim Israel in the amount of $133,385.00, plus costs.

f) As we have seen, the Fifth Circuit affirmed, finding that a question of fact existed on the issue of contributory negligence — or more accurately the comparative ngeligence — of Telfair on the record at the first trial. Petition for rehearing was denied, and this petition followed.

III. The Trial Testimony

The petitioner believes, of course, that the trial court was eminently correct in directing a verdict and striking the defense of contributory or comparative negligence at the conclusion of all of the evidence at the first trial and claims that the record shows no violation whatsoever of any duty which a longshoreman owes to lookout for his own safety, in a case like this, involving maritime or admiralty principles. The petitioner contends that the question is one of Federal Maritime law and that the trial court erred in granting Zim Israel a new trial on the ground that there was evidence of contributory negligence sufficient to submit the issue to the jury. The plaintiff, of course, simply seeks reinstatement of his judgment for $133,385.00.

Since it seeks to support the direction of a verdict on the issue of contributory negligence, the plaintiff concedes that the evidence at the first trial must be viewed in the light most favorable to Zim Israel on the issue of contributory negligence, with all permissible inferences drawn in its favor, and all conflicts in the evidence resolved in its favor.

So viewed, the record reveals:

a) Zim Israel, an Israeli corporation, was the owner of the Mazal in May, 1966. On the voyage in question, a cargo discharge in Miami, Florida, was completed at approximately 2:00 A.M. on May 3, 1966. The vessel then set out for Tampa, and arrived at the Tampa docks on the morning of May 4, 1966.

b) The hatches had been closed in Miami, after the stevedores had departed, and were opened in Tampa at approximately 12:45 P.M. on May 4.

c) The plaintiff, Herman Telfair, was a longshoreman for Luckenbach, the third-party defendant. He was a "header"—in essence, the foreman of a 14 man crew of longshoremen.

d) Sometime in the vicinity of 1:00 P.M. or shortly before, the plaintiff's crew was directed to the MAZAL by the stevedore to unload the cargo in the number 4 hatch.

The plaintiff's group then "rigged" the booms—the burdenfall and mainfall—and made ready to proceed into the hold to discharge the cargo.

e) The longshoremen "pullers" then proceeded down a ladder to the upper "tween deck", but before going further into the ship, to the cargo area, had to move some beams which were blocking the way.

f) Three witnesses testified as to events that transpired immediately thereafter. A detailed analysis of their testimony follows:

i) George White, Jr.

After the booms were rigged, the longshoremen went down one level and removed the beams (T. 112-114). The plaintiff, as "header," then directed the men to go on down (T. 115). At this juncture, White, a longshoreman for 25 years (T. 106-107), was standing right at the hatch leading to the ladder down to the next level or lower "tween deck" (T. 132-133). The plaintiff likewise was there, but was standing at the opposite side of the ladder (T. 133).

Robert Beam, known as "Boze", was closest to the ladder, so he began his descent. Then the plaintiff got on the ladder behind him (T. 115-116, 117). The witness, White, was standing right at the hatch (T. 116), watching "Boze" go down (T. 117). White saw "Boze" slip; "when he slipped", White thought "Boze" simply had made a misstep (T. 116, 117). When Boze reached the cargo, he went on ahead, and when White looked again he saw the plaintiff slip (T. 117).

The cargo extended upward, so when "Boze" stepped off, he actually stepped onto the cargo, and at this point, the plaintiff, Herman Telfair fell. When Mr. Telfair fell,

he called back up to White and told him to hold it; he warned the men to "be careful" coming down the ladder; and said: "There is something on that ladder. I done slipped and fell and hurt myself". (T. 118-119, 120). The next longshoreman on the ladder was Charlie Hawkins; and he continued down after Telfair's warning. Next down was "Bobo", Elwood Favors (T. 120).

When the witness White, proceeded down the ladder, he determined that there was grease on it; he testified that "some of it got on my hands". He could not be sure as to how many rungs had grease on them, but was certain that there was grease on at least one of them (T. 119). White showed the grease to the plaintiff and remarked: "No wonder you slipped". The grease was dark (T. 119, 122).

"Bobo" (Elwood Favors), also remarked that he had gotten grease on his hands (T. 121), and showed it to White (T. 123). White did not talk to Hawkins (T. 121). In the meantime, the plaintiff was laying on the cargo boxes (T. 121). White did not observe any of the ship's crew precede the longshoremen down the ladder (T. 122).

On cross-examination, White reiterated that he actually had seen the plaintiff slip. The plaintiff's head was below the deck when the accident happened (T. 130-131). White could see the ladder from where he stood as "Boze" went down. When "Boze" slipped, White thought it was simply a misstep. The plaintiff had been standing next to White, on the opposite side of the ladder. White did not know if the plaintiff was watching "Boze" or where the plaintiff was looking (T. 133). "Boze" said nothing when he slipped, but just continued on and White thought it

was a misstep. After Telfair's accident. Boze said: "I slipped on that ladder", and White remarked that he thought it was a misstep (T. 135-135). When White saw Boze slip, White said nothing to the plaintiff (T. 135-136).

White did not slip on the ladder; but he did get grease on his hand. The rest of the men went down. Mr. White climbed down the ladder facing it. As far as White knew, only "Boze" preceeded the plaintiff down the ladder that day (T. 137).

On redirect, this longshoreman, with 25 years of experience, described how one descends a ladder like the one involved. He described how a longshoreman takes hold of the handhold and then starts down. He testified that he did not put his hand in grease purposely.

His testimony, verbatim, follows:

> Q Mr. White, did you put your hand in that grease, the grease that you got on your hand—did you put your hand in that grease on purpose?
>
> A No, sir.
>
> Q Why did you put it there? Why did you get it on there?
>
> A You can't see—you know, when you are going down a ladder like this here, you see, if you start with this hand, you come down like this here (Indicating)—well, my right hand, it don't touch the same rung of the ladder my left hand do.

Q Let me ask you this. Will you step over here and show the jury how you go down one of these ladders? I suppose you go through a manhole first; right?

A You go like this here. Like this is the hatch, you go down this one, then you got to walk a little piece about as far as from here. There is a handhold here you can catch as you start down this ladder. (Indicating)

Q What do you do as you step into that hold? Do you grab hold with your hand?

A Grab hold and go right on down the ladder.

Q Do your feet get to the rungs of the ladder before your eyes do, as you are going down?—I guess so; is that right?

A That's right.

Q So as you go down the ladder, you are facing the rungs, and where are you looking as you go down?

A You are looking at the wall.

Q Just looking ahead at the wall?

A You know, the back of the ladder.

Q Right. This part right in here? (Indicating)

A Yes.

Q So you would be going down this ladder facing this way, and hand over hand down?

A Like this here. Your hand catches every other ladder. (Indicating)

Q Your hand catches every other rung?
A That's right.

Q All right. Now, as you go down, is there any way for you to see grease on the ladder, if it is there?
A No.

Q —As you are going down?
A No.

Q One more thing. As you were standing up in the area right above where the accident took place, and you looked down and you saw Boze or Robert Beam—you said you thought it looked like a misstep—why didn't you say anything to Herman?
A I thought he made a misstep.

Q Had Herman already yelled up to you before you started down the ladder that there was grease on the ladder?
A Yes, sir. (T. 138-140) (Emphasis Supplied).

He further testified, over defense objection, that he, White, did not slip because Herman had already told them "to watch out"; that after Herman hollered up to him, he did not look down on the rungs as he proceeded, though he tried the best he could, but could not see, and that "you can't look down under your foot". (T. 141). He came down the ladder supporting himself and his weight by his hands, not feet (T. 141). White observed grease only on his hands; he did not look at his shoes. He saw no grease on the deck prior to arriving at the ladder, and slipped on nothing before arriving at the ladder (T. 142).

ii) Herman Telfair

The plaintiff, 45 years of age, had worked as a longshoreman for over 20 years. He had been a "header" for approximately 10-11 years prior to the accident. On the day of the accident, the stevedore directed the plaintiff and his men to the MAZAL (T. 153, 163), and they boarded the vessel and rigged the booms (T. 164-166; 172-175). The men then descended down one level and moved some beams (T. 177-178). A crew man from the ship watched. (T. 179-180). The beams were moved on the upper "tween deck", and "Boze", who was closest to the hatch, began to descend the ladder to the lower "tween deck" (T. 181).

The plaintiff got on the ladder right after "Boze" and did not see him, and did not hear "Boze" say anything. The plaintiff testified, with reference to his own descent behind "Boze" as follows: "And usually when you are going down, you don't hardly look down like that. (Indicating). You just go down normally, you know" (T. 181). Boze got off the ladder, on the boxes, and the accident happened (T. 181).

The plaintiff's feet slipped just before he reached the cargo; he attempted to catch hold, and struck his knee; he came down three or four more steps, swung around, and yelled a warning back up to the other men. He then lay down, as the other men came down (T. 182).

The plaintiff got some grease on his pants where he hit, and a bit on his hand. He did not look to see if he had any on his shoes (T. 182). The ladder to the upper "tween deck" was the same kind of ladder as the one

on which he slipped; vertical with round rungs (T. 183). He did not slip on the first ladder (T. 183). Nor did he slip on deck or see any grease on deck or on the gangway (T. 184). The incident was reported to the stevedore (T. 184-185). White and Bobo (Favors) came down and said: "Yes, we got grease on our hands". (T. 186).

On cross-examination, the plaintiff specifically located the scene of the accident; it occurred at the forward end of hatch four on the ladder between the upper "tween deck" and the lower, about ½ way down the ladder (T. 208). The plaintiff was holding the ladder with his hands, coming down, when his right foot slipped (T. 208). He relinquished his hold on the ladder, then dropped, and recaught the ladder, and hung a bit. As he slipped, his right knee struck one of the rungs. This occurred about 1:15 P.M. (T. 209-210).

Boze told him he also had slipped (T. 210), but the others came down without slipping, after the warning by the plaintiff (T. 210).

On redirect, it was again pointed out that Boze told Telfair about Boze's slip after Telfair fell (T. 211).

iii) Robert Beam

Beam was a longshoreman who had worked under Telfair since 1951. On the date of the accident, the men boarded the ship at about 1:00 P.M. (T. 213) The booms were positioned and hatches removed. The men went down to the "tween deck", rolled the beams, and then proceeded to the lower "tween deck" to discharge some freight (T. 213-215).

Beam went down first, and the "header" (Mr. Telfair), came next. As Beam descended, he "slipped" a little bit, but did not fall. He completed his descent, then waited for the plaintiff (T. 216). Telfair came down behind him, and Beam saw Telfair slip, and saw grease on the ladder. It looked like cable grease, used on the booms—a dark thick grease. Telfair had some on his pants (T. 217). The accident was reported to the stevedore (T. 218), but not to the ship's crew (T. 218). After Telfair slipped, he yelled up to the other men to watch out because there was grease on the ladder (T. 219).

On cross-examination, Beam reiterated that he slipped a "little bit" on his descent. On deposition, Beam had said that he did not "slip" (T. 220); but interjected at trial that he meant on deposition that he did not fall. He reiterated at trial that his foot slipped (T. 221).

Likewise, on deposition, Beam had testified that he did not tell Telfair that he, Beam, had slipped; and he stated at trial that he had not told Telfair that he had slipped because he, Beam, did not slip, (T. 222-223). Finally, Beam had said on deposition that he did not see grease on the ladder until after the plaintiff slipped; whereas at trial, he testified he saw the grease prior to the plaintiff's slip, after Beam got into the hold, off the ladder (T. 224-228). He had no trouble descending (T. 229).

g) The parties stipulated that an accident occurred on May 4, 1966, and that Mr. Telfair fell. At trial, the only dispute was as to presence of grease (T. 64). There was testimony from the Chief Officer of the MAZAL that grease on a ladder would be dangerous (T. 42, 78-79), and a stipulation that a marine expert would testify that grease on a ladder, sufficient to make it slippery, is

dangerous (T. 398-399). Finally, there was testimony that graphite grease was used on the screws on "dogs" on the escape hatch, and some was used on the hinges (T. 66-67; 366-67) as well as on the booms (T. 170-173; 217).[1]

F.

REASONS FOR ALLOWING THE WRIT — RULE 19.

Simply put, the plaintiff seeks reinstatement of his original verdict and judgment of $133,385.00. There was no issue of contributory (comparative) negligence at the first trial, and the trial court clearly recognized this when it originally struck the defense and granted a directed verdict on the issue. The trial court erred in reversing its position granting the new trial and the Fifth Circuit erred in affirming.

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[1] The ship foreman on the MAZAL testified that on May 4, 1966, near the end of the work, he sent Telfair back down No. 4 to check on some goods, heard the plaintiff let out a cry, and then spoke to plaintiff who said he struck his knee on a rung coming up (T. 409). This was directly contrary to *his own* written report, signed by him, which described an accident to Telfair "going down" the ladder (T. 411) And it was contrary to his deposition in which he said he heard a sound and just "assumed" Telfair struck his knee (T. 411) This trial testimony is not relevant here, because if the foreman's testimony were believed, and truly reflected what happened, it would not show contributory negligence—but simply no liability, negligence, unseaworthiness or responsibility. It would not show contributory negligence which presumes some liability. In finding unseaworthiness, the jury clearly rejected this testimony.

The medical testimony clearly supported the verdict. The plaintiff, a 45 year old Negro, with wife and children, was compelled to undergo a cartilege removal, and then, because of arthritis, coupled with the torn meniscus, and operation, was compelled to undergo a knee joint fusion or arthodesis, permanently disabling him from work as a longshoreman. His fifth-grade education virtually obliterated his earning capacity, without re-education, which he was attempting. The screws in his knee, and joint-stiffening, caused chronic back problems, which eventually would cause disc problems. His loss of earnings and capacity were huge (T. 230, et.seq.; 313, et.seq.; 294, et.seq.) The trial court itself readily denied the post-trial motion for remittitur.

The evaluation of the conduct of Telfair involves an important and recurring issue of Federal law which has not been, but should be, settled by this Court. It concerns the duty of a longshoreman to "search" for and discover defects or grease on a ladder in a ship's hold, which a visual inspection could not reveal, or to anticipate such dangers and thereby to keep a lookout as others before him transcend the ladder. We believe no such duty exists, and a holding that such a duty does exist goes far to neutralize the beneficial and amelioratory doctrine of unseaworthiness.

The petitioner also believes that the decision and opinion here generates confusion in the law which should be resolved by this Court; and conflicts — at least in substantial part — with the principles enunciated in the Fifth Circuit cases of **CIA Maritima Del Nervion v. J. Flannagan Ship Corp.**, 5 Cir. 1962, 308 F.2d 120; and **Ð/Sove Skou v. Herbert**, 5 Cir. 1966, 365 F.2d 341; and the Second Circuit case of **Calderola v. Cunard Steamship Company**, 2 Cir. 1960, 279 F.2d 475, cert. den. 364 U.S. 884, 81 S.Ct. 172, which seem to negate any such duty, at least insofar as a stevedore employer is concerned, on an indemnity claim by the ship owner. Those principles should also apply here in evaluating the conduct of the longshoreman.

If reasonable men exercising impartial judgment might differ on the presence or absence of contributory negligence, then quite properly the issue should be submitted to the original jury. But where, as here, a) with all conflicts in the evidence resolved in Zim Israel's favor; and b) with all inferences drawn in its favor on the issue of contributory negligence, and c) with the facts construed most favorably toward a finding of contributory

negligence, reasonable men, acting impartially, still could not differ in their conclusion, and could not find contributory negligence, the situation was appropriate for removal of the issue from the jury's consideration; **Cater v. Gordon Transport, Inc.** 5 Cir. 1968, 390 F.2d 44, 46, cert. den., 392 U.S. 927.

Unseaworthiness obviously existed, as the jury determined. Grease on an access ladder, creating a dangerous and slippery condition, obviously established unseaworthiness and liability on the part of Zim Israel to this longshoreman; see generally, **Calderola v. Cunard Steamship Company**, 2 Cir. 1960, 279 F.2d 475, cert. den. 364 U.S. 884, 81 S.Ct. 172; **CIA Maritima Del Nervion v. James J. Flannagan Ship Corp.**, 5 Cir. 1962, 308 F.2d 120 (involving greasy ladder and defective ladder respectively, with resultant liability to longshoremen; cases however, concerned with indemnity claim of ship owner against stevedore); and there can be no doubt that Zim Israel, as ship owner and operator, was responsible to the longshoreman for breach of the warranty of seaworthiness. **Seas Shipping Co. v. Sieracki**, 328 U.S. 85, 66 S.Ct. 872 (1946).

In cases such as this, predicated upon unseaworthiness, contributory negligence is not a complete bar to recovery of course; but at most, where appropriate, it operates to mitigate damages on a comparative fault basis; **Symonette Shipyards, Ltd v. Clark**, 5 Cir. 1966, 365 F.2d 464, cert. den. 387 U.S. 908, 87 S.Ct. 1690; **Gibbs v. Keisel**, 5 Cir. 1967, 382 F.2d 917; **June T. Inc. v. King**, 5 Cir. 1961, 290 F.2d 404.

However, here, the plaintiff did not participate in creating the dangerous condition, and is not responsible

even in part for its existence; cf., Symonette, supra; Gibbs, supra; and was not on actual knowledge of its existence and did not knowingly expose himself to it, and challenge any obvious unseaworthiness in a careless fashion, cf., Superior Oil Company v. Trahan, 5 Cir. 1963, 322 F.2d 234, 237.

The reasoning of the trial court here, in granting the new trial, must be that a jury properly could find the plaintiff, as a reasonable man, was on constructive notice of the presence of the grease; that is, that in the exercise of reasonable care for his own safety, he should have discovered it prior to his accident and avoided it. The problem is, of course, that the proof, however construed, doesn't support such a determination, even if this type of contributory negligence were a partial defense in a case of unseaworthiness, which the plaintiff does not concede.

There was no proof that the grease was visible from the upper "tween deck". There was no proof that the plaintiff observed "Boze" slip (if indeed he did slip). There was no proof that anyone could see the grease on the ladder prior to descending it. The only testimony on visibility is from one witness, who could see it on the ladder from the lower "tween deck" after descent.

There is no testimony from which reasonable men could conclude that Telfair, as a reasonable man, exercising ordinary use of his senses and ordinary care, could have discovered the grease prior to his slip, nor is there even such a permissible inference on this record. He had no warning or indication that anything was wrong on the ladder.

White did not see grease prior to his descent, although he could see the ladder and watched "Boze" descend. White did not purposely put his hand in grease, yet he got some on his hand. The direct testimony of White was that there was no way to see the grease while on the ladder.

There was no proof that the plaintiff ever saw the grease before he fell; or that "Boze" (Beam) did, prior to his slip (if he slipped), or prior to his arrival on the lower "tween deck". Nor was there proof that Bobo (Favors) could see the grease until he got it on his hands.

White did not slip because he was warned (T. 140-41). He came down with weight on his hands (T. 141). He knew there must have been grease on the rung only because some got on his hands (T. 119).

There, of course, was no proof that the plaintiff was warned of presence of grease prior to his fall. The record reveals that others following him did not slip after the petitioner warned them. There was not an iota of testimony that the grease was visible from the top "tween deck", or even while descending; nor was there any proof that it would be reasonable to look at one's feet at the rungs below as one descended; the proof was to the contrary—a longshoreman would look straight ahead on descent and could not see down below his feet anyway, and that grease on the rungs was not visible while descending.

This is not a case of visible defect on a flat walking surface. It is a case of grease on a ladder rung in the depths of a ship. It is a case in which not one longshoreman saw the grease as he descended — but several got it on their persons during descent. And the only person who saw it on the ladder was already on the lower "tween deck".

The witness White did not see the grease, although he was watching "Boze" (Beam). He was unaware of its presence until Telfair warned him after Telfair slipped. Nor was there any indication Favors (Bobo) saw the grease prior to descent or while on the ladder. Nor did Beam see it until he reached the lower deck.

There was a void, then, of evidence of visibility of grease to Telfair before he slipped; of warning to him; of notice to him; and of ability to see grease prior to descending or while descending in the proper manner, or of visibility from the ladder in any event; and a void of any proof that he had any reason at any time to apprehend danger, or to search for grease; thus the trial court properly took the issue of contributory negligence from the jury in the first instance.

This is not purely a request for a factual review. It is an application for enunciation of principles concerning the duty of a longshoreman to look out for his own safety. The petitioner claims no such duty arose here, and, in any event none was breached.

Zim Isreal had its day in court. There was no sound reason given by the trial court for granting a new trial. No reasonable man under appropriate and applicable legal principles could find that the petitioner acted other than reasonably here. $133,385.00 was awarded by a jury. The second trial afforded the petitioner much less, and he believes he is entitled to reinstatement of his original award and judgment. The doctrine of unseaworthiness demands it, and the absence of contributory or comparative negligence demands it.

G

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Fifth Circuit reversed, and the final judgment of the trial court should be reversed and set aside, and the prior final judgment entered after the first trial should be reinstated.

Respectfully submitted,

WAGNER, CUNNINGHAM
AND VAUGHAN
412 Pierce Street
Tampa, Florida

AND

WALTER H. BECKHAM, JR.

AND

PODHURST AND ORSECK
2nd Floor, Concord Building
66 West Flagler Street
Miami, Florida

Attorneys for Petitioner

By _____
WALTER H. BECKHAM, JR.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing petition for a writ of certiorari has been mailed to McClain and Turbiville, Marine Bank Building, Tampa, Florida and Glos and Davis, 707 IBM Building, Tampa, Florida, attorneys for Luckenbach Steamship Co.; MacFarlane, Ferguson, Allison and Kelly, 512 North Florida Avenue, Tampa, Florida, and Fowler, White, Collins, Gillen, Humkey and Trenam, P. O. Box 1438, Tampa, Florida, attorneys for Zim Israel Navigation Company, Limited, this ____ day of October ____, 1970.

By _____
WALTER H. BECKHAM, JR.

APPENDIX

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27418

HERMAN TELFAIR,
Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,
Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(July 22, 1970)

ON PETITIONS FOR REHEARING

Before WISDOM, GEWIN, and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27418

HERMAN TELFAIR,
Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,
Third-Party Defendant-Appellee.

Appeals from the United States District Court for the
Middle District of Florida

(June 19, 1970)

Before WISDOM, GEWIN, and AINSWORTH,
Circuit Judges.

WISDOM, Circuit Judge: **Seas Shipping Company v. Sieracki**, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, extended the warranty of seaworthiness to longshoremen.

Ryan Stevedoring Company v. Pan-Atlantic S.S. Corporation, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, shifted the liability to the stevedore when it breaches the warranty of workmanlike service. In this longshoreman (Telfair) — shipowner (Zim Israel) — stevedore (Luckenbach) case, Telfair complains of the court's granting a new trial which resulted in a much lower verdict than the verdict in his first trial. We review, first, the district court's decision to grant a new trial because it had originally withheld from the jury the shipowner's defense of contributory negligence and, second, its conclusion that the stevedore breached its warranty of workmanlike service. We affirm the district court's judgment.

I.

On May 4, 1966, Herman Telfair, "header" (foreman) of a longshoreman gang, slipped on a ladder while descending into the hold of the Mazal, a ship owned by Zim Israel Navigation Company, Limited. The injury required first a cartilege removal and then, because of arthritis coupled with the torn meniscus and operation, a knee joint fusion or arthodesis, permanently disabling Telfair from work as a longshoreman. The screws in his knee and joint-stiffening produced chronic back problems which eventually will cause disc problems.

In December 1966, Telfair sued Zim Israel in a Florida state court for negligence and unseaworthiness, alleging that he had slipped on grease on an access ladder. Zim Israel removed the case to federal district court and filed a third party complaint against the stevedore company, Luckenbach Steamship, for indemnity. Both Zim Israel and Luckenbach argued that Telfair had been contributorily negligent.

At the close of all the evidence, the district court granted Telfair's motion for a directed verdict on the issue of contributory negligence. The jury found that Zim Israel was not negligent, but awarded Telfair $133,385 for the Mazal's unseaworthiness. The district court entered judgment March 27, 1968. Two months later, the court granted Zim Israel's motion for a new trial (timely filed), finding "that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff".

At the second trial, the jury awarded Telfair $50,000. The district court denied Telfair's motion for a new trial. The court also entered judgment in favor of Zim Israel and against Luckenbach on the third-party claim. Telfair and Luckenbach appealed.

II.

The precedent is longstanding in this Court that

> A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; . . . The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected.

Marsh v. Illinois Central Railroad Company, 5 Cir. 1949, 175 F.2d 498, 500; see Stewart v. Texas & Pacific Railway Company, 5 Cir. 1960, 278 F.2d 676, 678. Indeed, "[i]n few, if any, situations is the discretion of a trial judge broader than in granting a new trial". Willitt v. Purvis, 5 Cir. 1960, 276 F.2d 129, 132. Here the district court initially removed

the issue of contributory negligence from the jury, believing there was no evidence on which to submit it. Prompted by Zim Israel's motion, however, the district court upon further consideration concluded that he should have allowed that issue to go to the jury. Consequently, he granted the motion for a new trial.

In diversity cases, the question whether sufficient evidence is presented to send a case to the jury is controlled by federal standards in this Circuit. **Boeing Company v. Shipman**, 5 Cir. 1969, 411 F.2d 365, 368-70. **Boeing** directs that a "mere scintilla of evidence" will not prevent a directed verdict, but "if there is substantial evidence opposed to the motions", 'in the light and with all reasonable inferences most favorable to the party opposed to the motion", then the issue should properly be submitted to the jury. Here, Beam, the first longshoreman to descend the ladder "slipped a little bit" but did not fall. Telfair, had he been watching, could have seen him slip as did one of the other longshoremen. Telfair was not watching, however, because he climbed onto the ladder while the first longshoreman was still descending. The seven men who followed Telfair also descended without incident. Testimony shows that Telfair warned them of his accident. But several other individuals used the ladder that afternoon without warning. Although the ladder had not been cleaned, they suffered no mishap. We do not say that contributory negligence was a strong defense. We decide only whether the district court abused its discretion in granting a new trial because it had granted a directed verdict on contributory negligence. We conclude that there was no abuse of discretion.

III.

The district court deferred decision on the indemnity claim until the conclusion of the second trial. The court then held that Luckenbach had breached its warranty of workmanlike service and thus prompted the Mazal's unseaworthiness. Among other things, the district court specifically found that the first longshoreman to descend the ladder slipped but did not fall, noticed grease on his shoe and on the ladder, yet wrongfully failed to warn Telfair. Luckenbach, in its brief, "agrees that if Beam, the first longshoreman to descend the ladder, actually saw grease on the ladder and had sufficient time to warn Telfair, who was immediately behind him, but failed to do so, there would be an adequate basis under applicable law to hold the stevedore liable for indemnity to the shipowner." But Luckenbach attempts to persuade us to reject the district court's credibility determinations in this "shifting, conflicting, and obviously unreliable testimony". Id.

There is no doubt that Beam's story varied from deposition to first trial to second trial. But we are unable to say that the district court accepted the wrong version. And Beam's inability to keep the story straight need not require the conclusion that all versions were erroneous. In short, regardless of our views of the evidence, "[w]e do not retry the case. We may determine only whether the findings pass muster under the clearly erroneous concept of F.R. Civ. P. 52(a), 28 U.S.C.A." Smith v. United States, 5 Cir. 1961, 287 F.2d 299, 301.

> It is well settled that in order for a reviewing court to set aside findings of fact by a trial court sitting without a jury, it must be clearly demon-

strated that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them.

Chaney v. City of Galveston, 5 Cir. 1966, 368 F.2d 774, 776. Although Luckenbach has perhaps come closer than most, it has not met that burden.

We AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27418

D. C. Docket No. Civ. 66-465-T

HERMAN TELFAIR,
Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party
Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,
Third-Party Defendant-
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay the costs on appeal in this Court.

"PerWisdom, C. J."
6/19/70

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

No. 66-465 Civ-T

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY LIMITED, a foreign corporation,

Defendant and Third Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation,

Third Party Defendant.

ORDER DENYING MOTION FOR NEW TRIAL

This cause came on for hearing upon the Motion of the plaintiff for new trial and the Court, having considered the Briefs and the file in this cause, and having heard counsel for the parties, and being otherwise fully advised in the premises and considering that the Motion for New Trial filed by the plaintiff should be denied, it is:

ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed by the plaintiff be, and the same is hereby, denied.

DONE AND ORDERED in Chambers at Tampa, Florida this 22nd day of November, 1968.

JOSEPH P. LIEB

UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Judgment On Jury Verdict **Civ 31 (7-68)**

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA — TAMPA DIVISION

Civil Action File No. 66-465 Civ. T.

HERMAN TELFAIR,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LTD.,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph P. Lieb, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Herman Telfair, recover of the defendant, Zim Israel Navigation Company, Ltd., the sum of $50,000.00, with the legal rate of interest as provided by law, and his costs of action.

Dated at Tampa, Florida, this 22nd day of October, 1968.

WESLEY R. THIES

Clerk of Court

(SEAL)

By /s/ Carlton B. Epps

Deputy clerk

APPENDIX "E"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-465-Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY LIMITED, a foreign corporation,

Defendant and Third Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation,

Third Party Defendant.

ORDER

THIS CAUSE came on for hearing upon the Motion to Retax Costs and the Motion For Judgment In Accordance With Motion For Directed Verdict, or for Remittitur, or for New Trial.

The Court has heard argument of counsel, considered the briefs and file in this cause, and is otherwise fully advised in the premises.

The Court finds that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff. It is therefore, upon consideration,

ORDERED, ADJUDGED and DECREED:

1. That the Motion to Retax Costs be, and the same is hereby, denied.

2. That the Motion For Judgment In Accordance With Motion for Directed Verdict, or for Remittitur, be, and the same is hereby, denied.

3. That the Motion for New Trial be, and the same is hereby, granted, and the trial will be set down at the Court's earliest convenience.

DONE and ORDERED at Tampa, Florida, this 27th day of May, 1968.

/s/ Joseph P. Lieb

UNITED STATES DISTRICT JUDGE

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF
FLORIDA TAMPA DIVISION AT LAW

No. 66-465 Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY LIMITED,
a foreign corporation,

Defendant and Third
Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,

Third Party Defendant.

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR REMITTITUR, OR FOR NEW TRIAL

Zim Israel Navigation Company, Limited, Defendant, moves the Court: (1) To set aside the verdict of the jury and the judgment entered upon it and to enter judgment

in favor of the defendant and against the plaintiff on Count II of the Complaint of the plaintiff, in accordance with the defendant's Motion for Directed Verdict, or, if the foregoing Motion be denied; (2) To grant a new trial in this cause unless the plaintiff consents to a remittitur; or, if the foregoing Motions be denied, (3) To set aside the verdict and the judgment entered on it and grant the defendant a new trial on Count II for the following reasons:

1. The verdict is contrary to the law and the evidence.

2. The verdict is contrary to the manifest weight of the evidence.

3. The Court erred in granting the Motion of the plaintiff to strike the defense of contributory negligence asserted by the defendant and in withdrawing the issue of contributory negligence from the consideration of the jury over the objection of the defendant Zim Israel Navigation Company, Limited.

4. The Court erred in the manner in which it advised the jury that it had decided to withdraw the issue of contributory negligence from the jury, over the objection of the defendant.

5. The Court erred in charging the jury that it was of no consequence how the grease got on the ladder or how long it had been there.

6. The Court erred in overruling the objection of the defendant to the question put to the witness George White "Why did you not slip" and in allowing George White to answer that question.

7. The Court erred in denying the defendant's request that the Court charge the jury in terms or in substance in accordance with the terms of defendant's requested instructions No. 1 through 23.

8. The Court erred in charging the jury in substance in accordance with the plaintiff's requested instructions No. 1 through 43.

9. The verdict of $133,385.00 is grossly excessive, the result of passion, prejudice or mistake, and the amount awarded is so great as to shock the conscience of the Court.

FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM
P.O. Box 1438, Tampa, Florida
Attorneys for Defendant

By: Original signed by D. R. Villareal, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Judgment in Accordance with Motion for Directed Verdict, or for Remittitur, or for New Trial has been hand delivered to Wagner, Cunningham & Vaughan,

412 Pierce Street, Tampa, Florida, attorneys for Plaintiff, and to McClain & Turbiville, 615 Marine Bank Building, Tampa, Florida, attorneys for Third Party Defendant, and to Glos & Davis, 707 IBM Building, Tampa, Florida, attorneys for Third Party Defendant, this 4th day of April, 1968.

Original Signed by D. R. Villareal, Jr.

Attorney

APPENDIX "G"

Judgment on Jury Verdict Civ 21 (7-62)

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA —
TAMPA DIVISION

Civil Action File No. 66-465 Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LTD.,
a foreign corporation,

Defendant,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,

Third Party Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph P. Lieb, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Herman Telfair, do have and recover from the defendant,

Zim Israel Navigation Company, Limited, the sum of $132,355.00, with interest thereon at the legal rate as provided by law, plus plaintiff's costs, for all of which let execution issue.

Dated at Tampa, Florida, this 27th day of March, 1968.

Clerk of Court

(SEAL)

By /s/ Carlton B. Epps

Deputy clerk

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-665 Civ-T

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
a foreign corporation,

Defendant and
Third Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,

Third Party Defendant.

FINAL JUDGMENT

This cause coming on to be heard before the Honorable Joseph P. Lieb, one of the Judges of the above-styled Court, and Oscar V. Montano, foreman of the jury, and eleven other good and lawful men, who being duly sworn according to law, and after having heard testimony and evidence adduced before them, and having heard the charges of the Court, and being fully advised in the premises, and having retired to consider their verdict, returned to open Court and rendered the following verdict:

"We, the jury in the above-entitled cause, find for the plaintiff, Herman Telfair, on Count 2 (the seaworthiness count), and against the plaintiff on Count 1 (the negligence count), and against the defendant, Zim Israel Navigation Company, Limited, on Count 2 (the seaworthiness count) and for the defendant on Count 1 (the negligence count), and assess the plaintiff's damages at the sum of $133,385.00.

So say we all.

Dated at Tampa, Florida, this 27 day of March, 1968.

/s/ Oscar V. Montano

FOREMAN"

It is therefore ORDERED and ADJUDGED that the plaintiff, Herman Telfair, do have and recover from the defendant, Zim Israel Navigation Company, Limited, the sum of $133,385.00, plus plaintiff's costs to be taxed, for all of which let execution issue.

DONE AND ORDERED in Chambers at Tampa, Florida, this 27 day of March, 1968.

/s/ Joseph P. Lieb

U. S. DISTRICT JUDGE

APPENDIX "I"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 68-465-Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
a foreign corporation,

Defendant

VERDICT

We, the jury in the above-entitled cause, find for the Plaintiff, Herman Telfair, on Count 2 (the seaworthiness count), and against the Plaintiff on Count 1 (the negligence count), and against the Defendant, Zim Israel Navigation Company, Limited, on Count 2 (the seaworthiness count) and for the Defendant on Count 1 (the negligence count), and assess the Plaintiff's damages at the sum of $133,385.00.

So say we all.

Dated at Tampa, Florida, this 27 day of March, 1968.

/s/ Oscar V. Montano

FOREMAN